



Northwest Justice Project

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Executive Director

April 22, 2014

VIA Email: denise.foster@courts.wa.gov

Justices of the Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Comments on Proposed Revision to RAP 10.2 (Amicus Brief Deadlines)

Dear Honorable Justices:

The Northwest Justice Project (NJP) is the statewide publicly funded provider of civil legal aid for the poor in Washington. As a statewide organization that advocates on a broad range of issues which impact low-income persons, NJP frequently participates as amicus curiae in Washington's appellate courts. As such, NJP is deeply interested in the proposed changes to Rule of Appellate Procedure (RAP) 10.2, revising the time frames for filing amicus curiae briefs in this court and the courts of appeal. The stated purpose of the proposed revisions is to "minimize uncertainties regarding amicus curiae brief deadlines, increase the time available after an amicus brief is submitted for the parties to file answering briefs, and allow the court more time to fully consider amicus-related submissions in advance of oral argument." While NJP supports the goals of the changing RAP 10.2, we are concerned that the proposed rule with three different and alternate triggers for when the timeframe for filing an amicus brief runs is likely to create confusion, with the resulting need to use scarce judicial resources to determine whether (1) an amicus brief was timely filed; and/or, (2) there is particular justification for filing an amicus brief outside the set deadline.

The current rule sets the deadline for filing amicus briefs at thirty (30) days prior to the date set for oral argument. The timeframe in this rule has been long-standing and, at least from the perspective of NJP, has worked well. One reason for this is that it avoids duplication by providing amicus the opportunity to review all of the briefs, including the appellant's reply brief, in order to provide the court a unique perspective and to discuss arguments or issues not fully addressed by the parties. A filing deadline in the Supreme Court of 45 days before the date set for oral argument would similarly provide certainty as to the time frame, and sufficient opportunity for amicus to prepare and file an amicus brief after submission of the briefs of all parties, including supplemental briefs filed per RAP 13.7. Assuming the matter is not expedited for oral argument, this would similarly provide the parties sufficient time to file an answer to any amicus brief as permitted by the rules.

Setting up a more rigid alternative “whichever is earlier” time frame of 90 days after the grant of review arguably provides the court more time to review and consider the issues addressed by amicus, as well as any answer submitted by the parties. However, it creates confusion as to the applicable deadline and may impair the ability of amicus to comply with the amicus curiae rules if there is any delay by the parties in filing supplemental briefs or in the event the review and oral argument are expedited in any way.

The “90 days after review has been granted” deadline also assumes that potential amici are aware of all petitions for review being filed and systematically track each petition as review is granted. In NJP’s experience, we often decide to participate as amicus only after learning of a case from a party who may seek NJP’s amicus participation after review is granted or otherwise upon our discovery of a pending case that has implications for our client community. Like many organizations, NJP does not have the resources to systematically track all petitions for review filed or to evaluate the implications of each case for our client community long before a case is called to our attention by a party or other potential amicus organizations. In such cases, 45 days before oral argument is a manageable deadline for a later-discovered case in which NJP may have a substantial interest, as it provides sufficient opportunity to obtain the briefs of the parties and determine how NJP’s perspective may be helpful to the court. It also would seem to provide sufficient time for the parties to answer and for the court to consider the arguments ahead of the oral argument date.

If “90 days after review is granted” is adopted as the amicus deadline, we would hope that the Court would liberally grant leave to file an amicus brief on reasonable grounds, including that amicus does not learn of the pending case (or supplemental briefing is not completed) within the filing timeframe.

One concern with the proposed revisions is they set a separate deadline for filing an amicus brief in the Supreme Court than in the Courts of Appeal. This would be a new approach and inconsistent with our long-standing RAP 10.2. While lawyers should be able to comprehend the difference, which is clearly delineated in the proposed rule (and with time adequately comply), the different trigger for the deadlines in the Supreme Court and Courts of Appeal is confusing. Also, under the deadline for the Courts of Appeal of “not later than 45 days after the due date for the last brief of respondent” prospective amicus may not always know the date on which a last brief of respondent is filed. This is especially true if the anticipated filing of any brief is delayed. Moreover, this allows no time for amicus to adequately consider a reply brief filed by the appellant, assuming one is filed within 30 days after the brief of respondent. If any delay occurs in filing a reply brief, amicus would have no benefit of the reply brief in preparing the amicus brief.

Also, while this may be unusual, in NJP’s recent experience we have participated in appeals in which no brief of respondent is filed at all, usually because the respondent is pro se. In such a case, the date from which the deadline for filing an amicus brief is not triggered at all and thus creates a gap in when any amicus brief would be due. Again, we hope and assume that such circumstances would constitute “particular justification” allowing a different date for filing an amicus brief. But it is unclear under the rule as proposed what would constitute “particular justification”. Also, it is unclear whether prospective amicus needs to file a

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motion to participate as amicus setting out the particular justification prior to filing the amicus brief in order for the court to (1) review the justification and determine to grant leave to file outside the deadline; and (2) set a date specific for when the brief would be due. Greater certainty would exist if the rule retains the simplicity of the current rule and just set a firm deadline of 45 days before oral argument. It would also avoid the need for courts to use judicial resources to determine whether "particular justification" exists in a given case.

We agree that the 30-day prior to oral argument rule provides little time for the court's consideration of an answer to amicus, especially if the answer is filed less than 10 days prior to oral argument. However, we urge the Court to adopt the simpler route of expanding the deadline to 45 days before oral argument for all amicus briefs in both the Supreme Court and Courts of Appeal, and to not create confusion with different and alternative time frames in each court.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in dark ink, appearing to read "Deborah Perluss", with a long, sweeping horizontal line extending to the right.

Deborah Perluss

Director of Advocacy/General Counsel